A

PP

v.

CHUNG TSHUN TIN & ORS

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
HAMID SULTAN ABU BACKER JC
[CRIMINAL TRIAL NO: K47-02-2002]
20 JUNE 2007

C ***EVIDENCE:*** *Adverse inference - Whether presumption arose - Trafficking in 1599.9 grammes of Methamphetamine - Police officer acting as an agent provocateur conducted undercover operation to purchase drugs - Failure of prosecution to tender finger print evidence - Failure of prosecution to tender tape recording evidence - Failure of prosecution to call informer - Whether adverse inference under s. 114(g) Evidence Act 1950 could be drawn against*
D *prosecution*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Section 2 - Trafficking in a dangerous drug - Common intention, whether established - Alleged act of trafficking relied on by prosecution was "selling" - 2nd and 3rd*
E *accused were not selling anything - No common intention to sell since 2nd and 3rd accused did not have any interest or proprietary rights*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking and possession - Trafficking not proven - Accused had custody or control of drugs - Presumption under s. 37(d) of DDA 1952 that accused had*
F *knowledge - Prima facie case for possession established - Charge amended to one of possession under s. 12(2) Dangerous Drugs Act 1952*

CRIMINAL PROCEDURE: *Charge - Defective charge - Charge did not set out ingredients of offence under s. 2 of DDA 1952 - Fatal error - Accused must*
G *be told precisely about his offending act and law that has been infringed by him - Criminal Procedure Code, ss. 152, 154*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Sufficiency of proof - Charge of drug trafficking - Prosecution asking court to infer on more than 4 occasions - Inference weaker evidence than*
H *presumptions - Whether principle against use of double presumption violated - Whether unsafe for court to convict - Whether prosecution had established a prima facie case*

I All the accused persons were charged with trafficking in a dangerous drug, to wit 1599.9 grammes of Methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act read together with s. 34 of the Penal Code.

On 18 July 2001, in room no. 1017 at the Tang Dynasty Hotel, ASP Khoo Say Peng (PW3), a police officer from the Bukit Aman Police Headquarters, acting as an agent provocateur, had conducted an undercover operation to purchase drugs. In this operation, he was first introduced by an "informer" to the 3rd accused. Following this introduction and without any further participation of the "informer", PW3 began dealing with the 3rd accused. As the deal progressed, the 3rd accused brought the 2nd accused, who in turn took control of the bargaining process with PW3. The deal for the sale and purchase of the said drugs was concluded when the agreed price was reached. The 3rd accused, then called in the 1st accused, who came into the room bringing along what was later confirmed by the Government Chemist to be 1599.9 grammes of methamphetamine. When asked by PW3 about the drugs, the 1st accused gave the assurance that the drugs were of high quality and weighed 2 kilogrammes. All three accused persons were arrested in room 1017 Tang Dynasty Hotel with the said drugs on the table. The prosecution's case was that the three accused with the intention common to them all was in the act of selling the drugs to PW3. The prosecution claimed that proving that the drugs were delivered, though no money changed hands, was sufficient to be an "act of selling" the drugs, and was by virtue of the definition under s. 2 of the DDA, sufficient to prove trafficking. The prosecution did not call the informer as a witness, though he was offered as witness at the end of prosecution's case.

Held (amending charge to one of possession under s. 12(2) DDA):

(1) If the plastic bag was handed over to PW3 by the 1st accused then there will be finger print impressions. However, the prosecution did not tender finger print evidence. Further, the conversation ought to have been recorded in a planned operation as in this case. The failure of the prosecution to call the informer, Ang and produce finger print evidence and tape recording evidence or like material warranted the court to invoke s. 114(g) EA 1950. (paras 5 & 10)

(2) Common intention under s. 34 of the Penal Code will not apply in this case. The criminal act as alleged by the prosecution was trafficking. The charge did not specifically say what the alleged act of trafficking the prosecution was relying on. From the submission, the prosecution was relying on "selling". Clearly the 2nd and 3rd accused were not selling anything to the agent provocateur. Thus there cannot be a common intention to sell, when the 2nd and 3rd accused were not shown by evidence to have any interest or proprietary rights in the goods for sale. (para 11)

(3) The charge did not set out the ingredients of the offence under s. 2 of DDA 1952. This was a fatal error, taking into consideration that the accused were facing a charge relating to capital punishment. When a person is charged with a criminal offence, he must be told precisely not only the act which he is alleged to have committed that constitute the offence but also the law that he is said to have infringed. (para 11)

(4) The prosecution for one moment said there was direct evidence but at least in more than 4 occasions in their submissions requested the court to infer. Inference is weaker evidence than presumptions under the law. The prosecution in asking the court to infer more than four times to link the charge of trafficking violated the principle against the use of double presumption. Further, since the court had invoked the presumption of adverse inference, it was unsafe for the court to rely on the prosecution's version on what was the conversation held by the informer and the accused and the agent provocateur. Applying the maximum evaluation test set out in *Balanchandran v. PP* [2005] 1 CLJ 85, the prosecution had not established a *prima facie* case. (para 15)

(5) At the material time of arrest all the accused had custody or control of the drugs. Pursuant to s. 37(d) of DDA 1952, the law presumes that the accused had knowledge and in consequence there was a *prima facie* case for possession under s. 12(2) of DDA 1952. Therefore, the court exercised its discretion to amend the charge to one of possession under s. 12(2) of DDA 1952. (paras 15 & 16)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chu Tak Fai v. PP [2007] 1 MLJ 2001 ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 ***(refd)***
Lee Lee Chong v. PP [1998] 4 CLJ 655 CA ***(refd)***
Mohd Isha Alias & Anor v. PP [2003] 2 CLJ 142 CA ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Namasiyam & Ors v. PP [1987] 2 MLJ 336 ***(refd)***
Osman Abdullah v. PP [1958] MLJ 12 ***(refd)***
Pek Tin Shu v. PP [1948] MLJ 110 ***(refd)***
PP v. Mohamad Halipah [1982] 1 MLJ 155 ***(refd)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Padi Abdullah [1989] 2 MLJ 60 ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Suzie Adrina Ahmad [2006] 3 CLJ 889 CA ***(refd)***
PP v. Syed Bakri [1955] MLJ xvii ***(refd)***
Sathaiah v. R [1938] MLJ 30 ***(refd)***
State v. Raghavan Pillai AIR 1959 Kerala 248 ***(refd)***
Tan Peng Ann v. PP [1949] MLJ Supp 10 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152, 153, 154, 422
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (j), 40A(1), (2)
Evidence Act 1950, ss. 107, 113, 114(g)
Penal Code, s. 34
Subordinate Courts Act 1948, s. 29(1)

For the prosecution - Suhaimi Ibrahim (Raja Zaizul Faridah Raja Zaharudin with him) DPPs
For the 1st and 2nd accused - Datuk Chau Chin Tang (Yong Pei Yi with him); M/s Chau & Thien Advocates
For the 3rd accused - Patricia Hiew; M/s Fernandez & Co Advocates

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the submission of the defence that there is no *prima facie* case for the charge of trafficking.

[2] The prosecution's case is based on the fact that through the assistance of an informer, and a police agent provocateur, they were able to negotiate a deal for the purchase of drug through the assistance of the 3rd accused, and thereafter, through the 2nd and 3rd accused in the absence of the informer. The 2nd accused during the negotiation contacted some one called Ah Ken, his supplier and the drugs were sent to the agent provocateur through the 1st accused. All the accused persons with the drugs at the time of the purported sale to the agent provocateur were arrested at the Tang Dynasty Hotel and charged for trafficking. The charge read as follows:

> That you all, on the 18th July, at about 11.40p.m., at the room number 1017, Tang Dynasty Hotel, in the District of Kota Kinabalu, in the State of Sabah, in furtherance of common intention did traffic in a dangerous drug, to wit 1599.9 grammes of Methamphetamine and that you all have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act read together with Section 34 of the Penal Code.

In addition, there was evidence established during the prosecution's case that there was another person who was arrested in a car at the time of the incident at the Hotel. Investigation was done and that person was not charged. Materially, this evidence was not led during examination-

in-chief of the prosecution witness. The prosecution did not call him as a witness, though he was offered as witness at the end of prosecution's case. Serious objections have been taken by the defence for not producing the informer as well as the other person on the basis that they are material witnesses to the case.

[3] The prosecution, *inter alia,* submits as follows:

(a) on the 18-07-2001, in room no. 1017 at the Tang Dynasty Hotel, ASP Khoo Say Peng (PW3), a police officer from the Bukit Aman Police Headquarters, acting as an agent provocateur had conducted an undercover operation to purchase drugs. In this operation, he was first introduced by an "informer" to the 3rd accused. Following this introduction and without any further participation of the "informer", PW3 began dealing with the 3rd accused. The deal began with the bargaining of the price of the said drugs. As the deal progressed, the 3rd accused brought the 2nd accused, who in turn took control of the bargaining process with PW3. The deal for the sale and purchase of the said drugs was concluded when the agreed price was reached. The 3rd accused, then called in the 1st accused, who came into the room bringing along what was later confirmed by the Government Chemist to be 1599.9 grammes of methamphetamine. All three accused persons were arrested in room 1017 Tang Dynasty Hotel with the said drugs on the table.

(b) the elements of the charge that the prosecution need to prove were that all the three accused had in furtherance of their common intention did traffic of the said dangerous drugs, and for this purpose the prosecution is invoking the aid of s. 34 of the Penal Code.

(c) the prosecution is not relying on the presumption allowed under the DDA, in order to establish the above element and charge. The prosecution's case is that the three accused with the intention common to them all was in the act of selling the drugs to PW3. In this case, proving that the drugs were delivered, though no money changed hands, was sufficient to be an "act of selling" the drugs, and shall by virtue of the definition under s. 2 of the DDA, be sufficient to prove trafficking. (d) the prosecution will rely on the case of *PP v. Sa'ari bin Jusoh* [2007] 2 CLJ 197, where Augustine Paul FCJ opined:

> A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement or a sale.

(e) And At p. 227, concurring but with a different approach, Abdul Aziz Mohammad FCJ held that:

> For my part, in considering the dictionary meaning of "sell" for the purpose of determining the ordinary meaning of "selling" in the definition of "trafficking", I would reject Webster's meaning No. 2, without having to resort to the existence of paras (b) and(c) of s. 39B(1), as one that could not have been intended by the legislature. The meaning intended is meaning No. 1, which for the present case is "to … deliver … goods … for money". So long as the delivery is for money – which the delivery in this case was – as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller.

(f) in the initial negotiation, the 3rd accused had said that the price for a kilogramme of "syabu" is RM80,000. PW3 then bargained for RM70,000 per kilogramme, an amount which the **3rd accused did not settle for since he is not the supplier of the drug** (emphasis added). For the price to be lowered, the 3rd accused said that he needed to consult with his brother. The 3rd accused then made a phone call to his brother as the payment at that time could not be settled for lesser sum. PW3 then showed the money he had with him with a view of convincing the 3rd accused that he had the money to purchase two kilogrammes of "syabu", if the price was agreed at RM70,000 a kilogramme. Upon seeing the money, the 3rd accused made another phone call, after which the 3rd accused said to PW3 that to lower the price, he need to negotiate directly with his brother. The 3rd accused then left the room.

(g) at about 10pm, the 3rd accused came back to room 1017 and with him was another person whom he introduced as his brother by the name of "Usin" (2nd accused). When they came in, the 2nd accused immediately asked to see the money. The money was shown and counted.

(h) the only inference from that circumstance is that the 3rd accused must have told the 2nd accused about the money and its value.

(i) after being satisfied that the value of the money was RM140,000, the 2nd accused then mentioned to PW3 that the cost price from his supplier was RM140,000. He then made a phone call. **After the phone call, the 2nd accused told PW3 that the drugs will be delivered to the room and that he must then pay to that person directly and not to him**. (emphasis added).

(j) The reasonable inference here is that the price of the drugs was set at RM140,000 for 2 kilogrammes. This shows that the term for the sale of the drugs was concluded. What remained was for the drug to be delivered.

(k) for the delivery, the 2nd accused left the room to bring the person who would deliver the drugs. At about 11.35pm, the 2nd accused came back to the room and with him was the 1st accused. When the 1st accused came, what PW3 saw is better described by referring to the following part of the evidence:

> The Chinese was standing in front of me holding a blue plastic bag which he brought in. He then put it on the table and took out a package wrapped in newspaper. He opened the Chinese newspaper wrapping and I can see 3 transparent plastic bags containing clean whitish crystal which I suspected is syabu. There was also another red plastic bag together and the Chinese also opened the red plastic bag and inside it was another clean plastic packet containing clean whitish crystal.

(l) when asked by PW3 about the drugs, the 1st accused gave the assurance that the drugs were of high quality and weighed 2 kilogrammes. By this assurance, one can only infer that the 1st accused must have knowledge of the negotiation that has taken place as he knows the type and quantity of the drug asked for.

(m) from the above facts the prosecution had succeeded in tendering strong reliable evidence to show that "the drugs were delivered for money".

(n) from the above circumstances, when the drugs were delivered, the only reasonable inference is that the drugs were delivered for money. Adopting the principle from the *Sa'ari (supra)*, there was an act of selling and by invoking the definition under s. 2 of the DDA 1952, this is trafficking.

(o) from the line of questioning by the defence counsel, it is observed that they are suggesting that the informer is either an agent provocateur or an accomplice. It is a settled law that an informer will enjoy the privilege of being protected under s. 40(1) of DDA 1952. However, an agent provocateur or an accomplice does not have such protection. The dividing line between an informer and an agent provocateur is the degree of that person's participation in the sale of the drugs. If an informer plays a role more aggressively in the dealing of the sale of the drugs then he would loose that protection. Thus, the non-calling of this witness (informer) to give evidence may cause the court to invoke s. 114(g) of the Evidence Act. [See *Lee Lee Chong v. PP* [1998] 4 CLJ 655 CA, *Mohd Isha*

Alias & Anor v. PP [2003] 2 CLJ 142 CA, *PP v. Mansor Mohd Rashid & Anor* [1997] 1 CLJ 233 FC, *Namasiyam & Ors v. PP* [1987] 2 MLJ 336, *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 FC, *Munusamy v. PP* [1987] 1 MLJ 492]. It is therefore important to consider whether from the circumstances of the evidence adduced by the prosecution, the informer had crossed this thin line. This is a question of fact to be considered by the trial judge.

(p) if the witness is an agent provocateur, then he is to be called. This, the prosecution had done. Under s. 40A(1) and (2) of the DDA 1952, his evidence is admissible. The evidence of PW3 as to what had transpired in room 1017 before the raid should be accepted by the court. On this evidence, the court should find that the element of trafficking is proved. [See *Namasiyam & Ors v. PP* [1987] 2 MLJ 336, *PP v Mohamad Halipah* [1982] 1 MLJ 155, *PP v. Padi B Abdullah* [1989] 2 MLJ 60].

(q) it is clear from the evidence adduced that the three accused had acted in furtherance of the common intention of them all, which is to sell the drugs to PW3. The plan was for the 2nd and the 3rd accused to negotiate the price on behalf of the 1st accused. Upon price being agreed, the 1st accused would deliver the drugs in exchange for the money agreed upon. In the case of *Namasiyam & Ors v. PP* [1987] 2 MLJ 336, the court held that:

> Section 34 of the Penal Code states:
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
>
> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be

A

> inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by J.K. Soonavala page 188 to 193).

Applying the above principle, it is our humble submission that in proving that the three accused persons had acted in concert, the prosecution is
B urging the court to infer from the surrounding circumstances, plus the conduct of the three accused that there was the meeting of mind.

(r) the defence on the facts is seeking an acquittal in reliance of s. 37(j) of the DDA 1952, as was decided in *Leong Boon Huat v. PP* [1993] 3 MLJ However, that case is overruled by *Balachandran v. PP* [2005] 1 CLJ 85 and *Chu Tak Fai v. PP* [2007] 1 MLJ 2001. It is our contemplation that the defence will argue that the decision pertaining to s. 37(j) of the DDA should not be retrospectively applied. This argument is based on the fact that this is a 2001 case and if this case was heard earlier, that is before the case of *Balanchandran (supra)* and *Chu Tak Fai (supra)*, the accused persons would have received the benefit of the decision in *Leong Boon Huat (supra)* and therefore will be acquitted. This court is bound by the principle of "stare decisis" and therefore is not at liberty to disregard the decision in *Balanchandran (supra)* and *Chu Tak Fai (supra)*. In *Balachandran (supra)*, it was held that:

> The thrust of the first submission of learned counsel becomes a relevant matter for consideration only if the chemist had not analysed all the substances handed to him. The chemist had testified on the net weight of the pinkish substance in each of the five packages followed by the weight of monoacetylmorphines obtained from each package. This indicates that he had analysed all of the pinkish substances in each of the packages. It is confirmed by his evidence that the pinkish substances in the five packages were powdered during analysis. This makes it patent that the chemist had analysed all the substances handed to him thereby making it unnecessary for the prosecution to rely on s. 37(j).

The same issue was again decided by the Federal Court in the case of *Chu Tak Fai (supra)*, where it held that:

> It is clear therefore that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary.

See *PP v. Suzie Adrina bte Ahmad* [2006] 3 CLJ 889 CA.

> Further, even on the basis accepted by the learned judge that the prosecution had established that the weight of the drug in question was 2.332g, he ought nevertheless to have called for the defence. This is because, as we have already said, the prosecution had here established a *prima facie* case of actual trafficking. And where an accused is shown to be a trafficker under s. 39(B)(1)(a) of the Act, the weight of the drug he or she carries has no bearing whatsoever on his commission of the offence.

[4] From the evidence, it is clear that when the negotiation was completed between the 2nd accused and PW3 in the presence of the 3rd accused and the 2nd accused had **made a telephone call to his supplier** (emphasis added). The evidence by the agent provocateur reads as follows (NOP p 25 line 10 to p. 28 line 7):

> Hussein wanted to see the money so I showed it to him and offered it to be counted. He then told me it is a lot of money and asked me to help him count, so I counted a bundle which is RM10,000 and he counted that there was 14 bundles. Then I told him that is all the money I have and could he sell me 2 kilos of Syabu for RM140, 000.
>
> Hussein then told me his cost price from his own supplier is already RM140,000. I then persuaded him to help me this time because I have come all the way from Limbang and do not wish to go back empty handed. Hussein then said he will agree to my terms and he will call his supplier. He then made a phone call. After the phone call, Hussein told me the Syabu will be delivered by 2 male Chinese and upon receipt of the goods I must pay to the Chinese and not to him anymore.
>
> After that the 3 of us just chit chatted until 11.25 and Hussein received a phone call and told me that the Chinese is downstairs. Hussein then left the room leaving me and Jeffry together.
>
> Around 10 minutes later Hussein came back into the room but there was only one male Chinese with him and then I close the room door without latching the room. If I have latched the room the striking party will not be able to enter the room.
>
> There were total 4 people in the room that is myself, Hussein, Jeffry and the Chinese man. I then set down on the sofa which had a table in front of me. The Chinese was standing in front of me holding a blue plastic bag which he brought in. He then put it on the table and took out a package wrapped in newspaper. He opened the Chinese newspaper wrapping and I can see 3 transparent plastic bags containing clean whitish crystal which I suspected is Syabu.

There was also another red plastic bag together and the Chinese also opened the red plastic bag and inside it was another clean plastic packet containing clean whitish crystal.

Bag means the coloured bags.

Packet means the clean plastic containing the suspected Syabu.

I then asked the Chinese man if the stuff good. He assured me they are of High Quality and is exactly 2 kilos. Upon hearing that, I pressed the dial button on my handphone which was at the right thigh and the chair thus making the signal call to DSP Fisol. The phone was already set up to call DSP Fisol.

I spoke Mandarin with the Chinese man, "Cheka Pin Haw Ma". "Pin" means ice. In that context, ice will mean the drug will be Syabu. That is the trade name for Syabu as I am a narcotic officer. It is also known internationally so.

The scientific name is Methamphetamine.

He answered back in mandarin. I guarantee you this 2 kilos is good. All the 4 clean plastic was on the table. The Chinese man was in front of me and the packet was on the table.

After that time, Jeffry was sitting at my left. Hussein was stood near to my left near to the Chinese man. We were all looking at the 4 packets.

Hussein is the man in the centre. The Chinese man is the one sitting on the left. (The 1st and 2nd accused identified).

Through out the whole dealing, the Chinese man was never introduced to me. 10 or 15 seconds after I gave the signal, I saw DSP Fisol leading the others. He shouted in Malay in Bahasa Malaysia "Polis, polis, jangan bergerak". The whole raiding party came in and all 3 were handcuffed.

I immediately stood up and took my RM140, 000 walked out of the room and went into room 1018.

[5] During cross-examination, learned counsel for the 1st accused questioned intensely why the conversation was not taped and asserted that it was the 2nd accused who brought and handed over the plastic bag with the drugs to the agent provocateur and not the 1st accused. Further, he said if the plastic bag was handed over to PW3 by the 1st accused then there will be finger print impressions and to this the agent provocateur said yes. However, the prosecution did not tender finger print evidence which would have assisted the court in this matter. There was no re-examination on this issue. On the facts of this case, the failure of the prosecution to adduce finger print evidence in a planned

operation such as this invites me to consider the provision of s. 114(g) of EA 1950. The evidence as to finger print was as follows (NOP p. 34 line 7 – 9):

> Q Would you agree if the 1st accused has handed the plastic bags his fingerprints it will be impressed in these plastic bags?
>
> A Yes.

[6] On similar note, I will say that the conversation ought to have been recorded in a planned operation as in this case. Further, the hotel Room 1017 was at all material times at the custody, control and occupation of the police. It would have been convenient for the police to tape the conversation. If that had been done it would have been easier for the court to accept the evidence of the agent provocateur without any doubt. In this case, the agent provocateur had given evidence that he was in the technical side of the police force. His scope of work includes bugging, video taping, taking photographs, tracking vehicles. All related to drugs he says. I find it difficult to accept the evidence of what transpired in the room from an agent provocateur who is an expert in bugging but has not done so but wants the court to believe his version of the story. Again, the failure of the prosecution, to adduce tape recording evidence or alike in a planned operation such as this invites me to consider the provision of s. 114(g) of EA 1950. It is my judgment that on the facts of the case it is unsafe to give much weight to the evidence of the agent provocateur in relation to the various conversations relating to the informer, as well as all the accused persons.

[7] The learned counsel for the 2nd accused, Ms. Yong Pei Yi during cross-examination, asserted that the 2nd accused had said that his supplier's name was Ah Ken, and then he had called Ah Ken. That part of the evidence reads as follows (NOP p. 40 line 10 - 15):

> Q After you showed the money to the 2nd accused, the 2nd accused told you that he will call the actual supplier whose name is Ah Ken. He then called Ah Ken?
>
> A Yes he called same one but the name was not mentioned.
>
> Put I put it to you the 2nd accused mentioned the name of Ah Ken?
>
> A No.

Further, the learned counsel for the 3rd accused, Ms. Patricia Hiew had asserted that the informer was actively involved with the negotiation. That part of the evidence reads as follows (NOP p. 41 line 2 – 18):

> Q When the informer was in your room, how did you address the informer?

A By his name. I cannot remember his name.

Q During the 10 minutes with the informer and the 3rd accused, you were telling the informer to convince the 3rd accused to provide the supplier?

B A No.

Put I put it to you during the 10 minutes, you did tell the informer to convince the 3rd accused to secure the supplier?

A No.

C Q Do you agree with me that the informer actively involved with the negotiation?

A No.

Put I put it to you that the informer was actually actively involved in the negotiation?

D

A No.

Put I put it to you the informer never left the room and he was always with the 3rd accused?

E

A He left the room.

To my mind, it was within the means and ability of the prosecution to tape the conversation and failing to call the informer on the facts of this case does not prohibit me from invoking adverse presumption again F under s. 114(g) EA 1950. In *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 where Edgar Joseph Jr. FCJ opined:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the function both of the prosecution and the defence.
>
> G
>
> On the other hand, it is clear that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.) The discretion, however, must be exercised having regard to the interests of justice, which includes being fair to the accused (per H Lord [8] Parker CJ in *R v. Oliva* [1965] 3 Al ER 116 at p 122; [1965 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 at p 49, applied in *R v. Nugent* [1977] 3 All ER I 662; [1977] 1 WLR 789).

Having said that, it is in our view clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see e.g. *Adel Muhammed el Dabbah v. A-G (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less that a statutory duty – the accused must be acquitted.

In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur, for it was he, who had put the appellant in touch with the undercover agent Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act .

In these circumstances, he came within the category of witnesses, described by Lord Roche in Seneviratne, as "witnesses essential to the unfolding of the narratives on which the prosecution case is based." The same might be said of the informer's friend.

Yet, neither the so called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial Judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence or in default to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, "the prosecutor will ensure that the accused is given the opportunity to call the witness". (Per the High Court of Australia in Richardson, *ibid*).

A We also observed that although Counsel for the appellant did, in the course of his address in the Court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the Judge direct his attention to this point. This, in our view, was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.

B

[8] Further, the prosecution did not disclose the name of ANG or his participation in this case when ANG had been arrested on the same date at the hotel. The investigating officer (I.O.) in his evidence only said as follows (NOP p. 54 line 6 – 7):

C Ada seorang bangsa cina juga telah ditangkap dibawah Hotel Tang Dynasty di serah kepada saya bersama sebuah kereta.

The learned counsel, Datuk Chau Chin Tang during cross-examination of the I.O. had stated that the 2nd accused had called one Ah Ken to supply 2 kilo of syabu and the I.O. conceded but such evidence was not forthcoming during examination-in-chief. That part of the evidence which has nexus to ANG who was arrested on that day by the police reads as follows (NOP p. 55 line 1 to p. 57 line 7):

D

Q The release of Ang is because he was innocent?

E

A Yes.

Q You believe Ang is credible person and his story credible?

A Yes.

F

Q Where is Ang now?

A Dipercaya di Singapura.

Q Is he going to be witness in this trial?

G A No.

Q Having found Ang is a credible person would you not agree with me his evidence in this trial will be of the greatest help to this Court?

H A Yes.

Q You have seen the statement of the 1st accused and the 2nd accused, both the accused revealed that the name of AH KEN?

A Yes

I

Q The 2nd accused also said in his statement that he will call Ah Ken for the supply of 2 kilo of syabu?

A Yes

Q You have also revealed the status of the 1st accused wherein it is stated that Ah Ken called him and asked him to make him to meet Ah Ken at certain place. Upon arrival at the ... the 1st accused met Ah Tin instead of Ah Ken. Ah Tin gave him a plastic bag. Later on at night, the 1st accused received a telephone call from Ah Ken. At that time Ah Ken called the 1st accused. Ah Ang was also in the car together with the 1st accused?

A Yes. That was in the statement of the 1st accused.

Q Will you agree with me as investigating officer of this case, Ah Ang will have been an in disposal witness in this trial because if he were to testify in Court he will corroborate most only the oral testimony of the 1st accused and indirectly the testimony of the 2nd accused. It will also corroborate further the cautioned statement of the 1st accused?

A Yes.

Q Why did you not put Ah Ang on bail to secure him as a witness?

A It was instructed by DPP.

Q Have you subpoenaed him to attend trial?

A After remand, he was released.

Q First time when the case was fixed for hearing on 14.8.2002 did you try to secure the attendance of Ah Ang?

A No. Not also instructed by DPP to do so.

Q Defence Counsels request to put the caution statement of the 1st accused and tender it as exhibit.

A It is the cautioned statement of the 1st accused with signature.

DPP: No objection.

Court: Cautioned Statement marked as Defence Exhibit - D1.

[9] The contents of the cautioned statement were consistent with the line of cross examination. I think the presence of Ang would have been great assistance to the court. The fact that the prosecution had not called a material witness, more so when the accused persons are facing a charge for capital punishment, invites me to invoke the presumption of s. 114(g) of EA 1950.

[10] On the facts of this case, the failure of the prosecution to call the informer, Ang and produce finger print evidence and tape recording evidence or like is material and warrants the court to invoke s. 114(g) EA 1950. The law regarding presumption is partly captured in s. 114 of EA 1950. Section 114 reads as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Apart from the presumptions mentioned in ss. 107 to 113, EA 1950 there is a large number of deductions under this section that the court may draw from the common course of natural events, human conduct, and the experience. The presumption here is at the discretion of the court and it is also rebuttable. The illustrations under the section are self explanatory, however they are not exhaustive. It will appear that there are no hard and fast rules with regard to the circumstances in which any fact or facts may be presumed to exist. Thus, the courts have to use their common sense and experience in judging the effect of particular facts and they are not subject to any particular rules to the subject.

Section 114(g) of EA 1950 particularly states:

> that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

In *Pendakwa Raya v Mansor bin Rashid & Anor* [1997] 1 CLJ 233 the Federal Court stated that the decision to invoke an adverse inference under s. 114 of the EA 1950 was not a matter of an inflexible rule but depended upon the circumstances of each particular case. The question to consider was whether the existence of a fact of a state of things made the existence of another fact or state of things so likely that it may be presumed to exist. The answer must necessarily vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

[11] The prosecution is relying on common intention under s. 34 of the Penal Code. I do not think common intention in this case will apply, my reason are as follows:

(a) Evidence was led to show that the 2nd and 3rd accused were not the suppliers. There was no assertion what their role was except it can be inferred that the 2nd and 3rd accused at the most would have only been introducers; like that of the role played by the

informer. I do not think that this evidence is sufficient to attract s. 34 of the Penal Code. The criminal act as alleged by the prosecution is trafficking. For trafficking we need to read the definition of trafficking in s. 2 of the DDA 1952 which states:

> trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

The charge does not specifically say what the alleged act of trafficking the prosecution is relying on. From the submission, the prosecution is relying on "selling". Clearly the 2nd and 3rd accused, from the evidence, were not selling anything to the agent provocateur. At the most, somebody was attempting to sell the drug through the 1st accused. Thus, in this case, there cannot be a common intention to sell, when the 2nd and 3rd accused are not shown by evidence to have any interest or proprietary rights in the goods for sale. Further, the evidence is negative to allege that the 1st accused had proprietary right to sell. Thus, on the facts of this case, the Federal Court decision of *PP v. Saari bin Jusoh* [2007] 2 CLJ 197 will not apply in relation to sale because none of the accused have proprietary interest in the drugs.

(b) Further, the charge in this case does not set out the ingredients of the offence under s. 2 of DDA 1952. I think this is a fatal error, taking into consideration that the accused are facing a charge relating to capital punishment. The law in this respect is captured in ss. 152 to 154 of CPC. For this case, it is sufficient if I refer to 2 sections namely, ss. 152 and 154 (excluding the illustrations) and they read as follows:

> 152. Form of charge.
>
> (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

154. When manner of committing offence must be stated.

When the nature of the case is such that the particulars mentioned in sections 153 and 154 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Section 152 specifically states that the charge must state the offence with which the accused is charged. A charge mentioning an offence by its specific name would be a sufficient charge, even if the ingredients of the offence are not given. However, if the specific name is not given, the ingredients cannot be implied [see *State v. Raghavan Pillai* AIR 1959 Kerala 248]. When a person is charged with a criminal offence, he must be told precisely not only the act which he is alleged to have committed that constitute the offence but also the law that he is said to have infringed. In *PP v. Syed Bakri* [1955] MLJ xvii Thomson J observed:

> I have repeatedly emphasised that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and that Magistrates should be at pains to see that this is done. If it is done, the prosecution knows what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case.

It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy, the exact nature of the charge brought against him, otherwise he may be severely prejudiced in his defence. He can be convicted only on proof of particular offence so specified. For this purpose, the judge cannot go beyond the exact wording of the charge in finding the accused guilty. In *Krishnan & Anor v. PP* [1981] 2 MLJ 121, the Federal Court stated that the omission to make any reference in the charge to the knowledge of the second

appellant that the first appellant had a pistol did not render the charge against the second appellant defective. Knowledge is a matter of inference and unless it is clear that the law requires knowledge to be stated in the charge, its omission did not render the charge defective. In *Osman bin Abdullah v. PP* [1958] MLJ 12, it was stated that in a case of murder, the interests of justice clearly requires that the accused person should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the same time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this is not made clear, the particulars stated in the charge 'do not give the accused sufficient notice of the matter with which he is charged'. Further, the court stated that apart from the provisions of the s. 422 of the Code, the case fell within the proviso to s. 29(1) of the Subordinate Courts Act 1948 to the effect that the Court of Appeal might, notwithstanding that it was of the opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considered that no substantial miscarriage of justice had occurred.

[12] Section 154 of CPC states that:

> 154. When manner of committing offence must be stated.
>
> When the nature of the case is such that the particulars mentioned in sections 153 and 154 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.
>
> ILLUSTRATIONS
>
> (a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.
>
> (b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.
>
> (c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.
>
> (d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

A

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

B

This section states that when the particulars mentioned in ss. 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge must contain particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. The provision of s. 154 of the Code was considered in *Sathaiah v. R* [1938] MLJ 30. McElwaine CJ was of the view that a charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons, and crime are insufficient to explain by what means the crime was committed. This is particularly necessary in charges of such offences as cheating. The particulars need not be incorporated in the charge. It is sufficient if they are contained in a separate memorandum supplied to the accused and to the court. Such a course helps the prosecutor by providing a simple list of the main points which he must prove; it helps the accused by letting him know exactly what he is alleged to have done that was wrong; it helps the court by giving it a proper outline of the case which enables it to appreciate the significance and bearing of any piece of evidence as it is given. In *Tan Peng Ann v. PP* [1949] MLJ Supp 10, the appellant was convicted on two charges of cheating and dishonestly inducing the delivery of property in contravention of s. 420 of the Penal Code. In the charges, no particulars were alleged of the way in which the appellant deceived the complainants. The court stated that in framing such a charge, it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which had been practised. Evan J in *Pek Tin Shu v. PP* [1948] MLJ 110 stated that when a charge, as a charge, is useless and when the accused, though he did not object to the form of the charge even though he was represented by counsel, must have been seriously embarrassed, and when it is manifest on the record that the court was misled, then the conviction and sentence cannot stand.

C

D

E

F

G

H

[13] The defence in reliance of the case of *Leong Boon Huat (supra)* attacks the analysis of the chemist in reliance of s. 37(j) of DDA 1952 which states:

I

> when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not

> less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug;.

I have dealt with similar issues in my judgment delivered on 18-06-2007 in Kuching High Court CT-45-11-2005-II *PP v. Peter Kong* which I adopt here and I do not wish to repeat the same for the purpose of this case. Save to say that I have gone through the evidence of the chemist in detail and the provision of s. 37(j) of DDA 1952 and the cases relating thereto. I accept the evidence of the chemist.

[14] Having deliberated on the pertinent issues, I must now make a finding whether the prosecution has established a *prima facie* case. More so in this case, the prosecution is asserting that they are not relying on any of the presumptions in DDA 1952 and they have purportedly proved the case by direct evidence. I do not think so, because the prosecution at various stages of their submission have invited the court to "infer" from the surrounding circumstances. I have in detail set out why inference cannot be used to establish a charge of drug trafficking in *PP v. Peter Kong (supra)*. I repeat the relevant parts here:

> I take the view for this case that only with the aid of the statutory presumption under section 37(d), the prosecution can establish a *prima facie* case against the accused for an offence under section 12(2) of DDA which reads as follows:
>
> > No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.
>
> and can be punished under s. 39A(2) with imprisonment for life or for a term which shall not be less than five years and also be punished with whipping of not less than ten strokes. Further, I take the view that for any law relating to capital punishment, life cannot be taken purely as a result of inference of a judge, as art. 5 of the Federal Constitution says according to law. Inference in capital punishment cases cannot be equated to law unless that inference made by the judge is one beyond reasonable doubt will lead to only one adverse conclusion against the accused. In drug cases, for the prosecution to drive home the offence of trafficking, it will be within constitutional guidelines to show direct evidence of trafficking and this can in my view to some extent be achieved by leading evidence as to motive as

A set out in s. 8 of EA 1950. Prosecution in drug trafficking cases often omits to introduce evidence of motive and shifts the burden on the shoulders of judges to infer knowledge of the drug to establish possession which will result in death sentence. I think that is wrong. I do not wish to elaborate on this issue further in this case as I find no evidence of trafficking and there was no argument put before me citing
B the views of judges and sages of law on this issue. In addition, I am not here armed with necessary materials on constitutional doctrine to throw more light to substantiate my views at this stage. But from the few books I hold closely, I can safely say such inference is not good evidence and as such is not compatible with religious principles of major faiths which is articulated in Rukun Negara, the 1st principle
C being "Belief in God". In this context, I believe the prosecution has a constitutional duty and obligation within the intent and spirit of Rukun Negara to make sure in drug trafficking cases to show good evidence according to law to convict a person and not shift the thrust on the judge to infer knowledge and then to rely on other provisions of the
D DDA 1952 to convict for trafficking. It will be more prudent for the prosecution to adduce direct evidence which they could if proper investigation and surveillance is done as being achieved in other jurisdiction. To invite inference from the judge to link a charge of trafficking in actual fact will have low probative value and will not pass the maximum evaluation test as propounded by the Federal Court in
E *Balachandran (supra)*. The learned judge Augustine Paul FCJ has as early as 1999 had anchored the argument in relation to *prima facie* case in *PP v. Dato' Seri Anwar Ibrahim (supra)*. I will say for any thing less than taking a life, prosecution may rely on presumptions but when it comes to life it cannot be purely based on inference when the law gives the prosecution every opportunity to prove the case by direct evidence,
F including motive which will have strong probative value in contrast to inference. Much scholarship has been advanced in the area of law of drugs by Professor Dr. Rani Kamarudin, who is now one of the Deputy Dean in International Islamic University Malaysia, particularly in his Ph.D thesis titled "Legal Aspects of the Control and Prevention of Dangerous Drugs Misuse – Comparative Study of Malaysian and
G English Law." Some support for my proposition can be found in the case of *Mohamed bin Hassan (supra)* where the Federal Court asserted that "In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of the
H possession as understood in criminal law, based on evidence.

[15] The prosecution for one moment says there is direct evidence but at least in more than four occasions in their submissions, some of which I have highlighted, request the court to infer. Inference is weaker
I evidence than presumptions under the law. The Federal Court in the celebrated case of *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC has prohibited the use of double presumption. The

prosecution in asking me to infer more than four times to link the charge of trafficking violates the principle stated by the Federal Court. Further, in this case, I have invoked the presumption of adverse inference and I have stated my reasons. In consequence, it will be unsafe for me to rely on the prosecution's version on what was the conversation held by the informer and the accused and the agent provocateur. Applying the maximum evaluation test set out in *Balachandran*'s case *(supra)*, it is my judgment that the prosecution has not established a *prima facie* case for various reasons stated above. However, on the facts of the case, it cannot be doubted that at the material time of arrest all the accused had custody or control of the drugs. Pursuant to s. 37(d) of DDA 1952, the law presumes that the accused had knowledge and in consequence there is a *prima facie* case for possession under s. 12(2) of DDA 1952.

[16] Since the prosecution has failed to establish a *prima facie* case for trafficking, the accused persons are entitled in law to seek for an acquittal. However, in this case, I am exercising my discretion to amend the charge on the grounds of public interest to ensure proper measures are taken to curb drug offences. For this purpose, I am amending the charge to one of possession under s. 12(2) of DDA 1952. AND to effectively to do so, I am inviting the prosecution to propose the suitable amendments to the charge to enable me to direct that the amended charge be read to the accused persons and a plea be taken individually. I shall thereafter proceed to make the necessary orders in relation to these proceedings.